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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

T.G., MOTHER

Petitioner,

versus

COMMONWEALTH OF KENTUCKY, CABINET FOR HEALTH AND FAMILY SERVICES

Respondent.

On Petition For Writ Of Certiorari To The Kentucky Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether KRS 625.090 is unconstitutional on its face.

2. Whether KRS 625.090 is unconstitutional as applied in the instant case.

3. Whether the trial court had before it any evidence of "abuse or neglect."

4. Whether the finding of the trial court was supported by "clear and convincing evidence."

5. Whether the Petitioner's Due Process rights have been infringed.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2008

No._____

T.G. Mother, Petitioner,

v.

Commonwealth of Kentucky, Cabinet for Health and Family Services, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

T.G., Mother, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Kentucky Supreme Court entered in the above-entitled case on February 19, 2009.

OPINION BELOW

The judgment of the Kentucky Supreme Court was entered on February 19, 2008.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(i).

PARTIES

T.G., Mother, Petitioner.

Commonwealth of Kentucky, Cabinet for
Health and Family Serivces, Respondents.

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STATUTE INVOLVED

K.R.S. 625.090., *see,* Appendix A.

STATEMENT OF THE CASE

Procedural history.

This action arises out of a Petition filed on or about April 8, 2005 by the Commonwealth of Kentucky, Cabinet for Health and Family Services (hereafter "the Cabinet" or "Respondent") against T.G. (hereafter "hereafter "T.G." or "Petitioner"), action # 2006-CA-001008, Jefferson Family Court, *T.G., Mother v. Commonwealth of Kentucky, Cabinet for Health and Family Services; A.J.M., an Infant* (hereafter "the Jefferson Family Court action"). Following a bench trial on December 20, 2005, the Jefferson Family Court entered an Order on March 14, 2006, finding that A.J.M. was an abused or neglected child as defined in KRS 600.020(1), and that it was in A,J.M.'s best interest that T.G.'s parental rights be involuntarily terminated.

T.G. appealed that judgment to the Kentucky Court of Appeals which, by an Opinion rendered on May 18, 2007, reversed the holding of the trial court. The Cabinet then appealed to the Kentucky Supreme Court which, on August 21, 2008 reversed the holding of the Kentucky Court of Appeals and reinstated the Order of the trial court.

Relevant facts

T.G. is the biological mother of A.J.M., born January 7, 2004. Upon her birth, the Cabinet

requested that A.J.M. be put on a 72-hour hold and filed an Emergency Custody Order (ECO) to obtain custody of her. the ECO was based upon T.G.'s diagnosis of obsessive compulsive behavior disorder and the prior removal of her two older children due to her noncompliance with treatment and her stipulations of abuse and neglect.

On August 26, 2004, the Cabinet filed for a second ECO, which was granted, and four days later filed a Juvenile Dependency, Neglect and Abuse Petition, alleging that A.J.M. was a neglected and abused child. The supporting affidavit from social worker Sky Tanghe read as follows:

> On or about July 29, 2004 CHFS reeived a report of neglect by child's NM [T.G.], indicating while NM was at a batting cage in Louisville KY she laid child on the concrete ground. During further investigation of case DCBS was advised by NM that she had 3 rental properties, one of which she would not allow social workers to enter, another home (where NM and child resided) was found to be in unsafe and unsanitary conditions. There are items stacked to the ceiling, the kitchen sink was full with dirty dished and stagnant water, the kitchen floor was cluttered with several boxes, paint can and old food. The NM signed a safety plan stating that wshe would reside at her 3rd property. The FSW observed this home and found home to be empty with a daybed (without a mattress) and a playpen. FSW has concerns that NM is not actually living

in this home. NM reports she is remodeling her other 2 properties in order to rent them to others. Child currently attends daycare at Kindercare learning center, staff has indicated concerns over NM's behavior, specifically stating there have been several times NM has brought the child into daycare with only a diaper on and has asked the teacher to dress the child. On morning of 8-18-04 NM brought child to daycare dressed. The NM was asked to fill out a form, in middle of doing so she stopped, grabbed the child and stormed outside. NM then brought the child back into daycare undressed, she asked teacher to dress child when she woke up (the child was already awake in NM's arms). Daycare indicates child appears never to be clean and her clothes are filthy. On first day NM came pick child up from daycare she did not recognize her child. The NM looked at the teacher and then at her child and then asked where her child was, she then slowly turned around and panicking asking where her child was. NM has a significant history with CPS, her oldest two chhildren are in the permanent custody of their MGM due to neglect by NM and NF. Mother has been disgnosed with obsessive compulsive disorder and elements of a paranoid personality. NM has received an assessment from Dr. Linda Bailey who believes NM would benefit from ongoing supportive and evaluative therapy as

> well as medication for her anxiety disorder. Child's NF, [Andrew M.], is not paying child support and does not have ongoing supportive contact with child. Affiant believes this child is at significant risk of neglect if left in the home with her NM.

Following the adjudicative hearing on October 6, 2004, the family court entered an order finding that the allegations in the petition were true, that A.J.M. was neglected, that reasonable efforts were made to prevent her removal from the home, and that A.J.M. was to remain in the custody of the Cabinet. Following a disposition hearing, the family court entered an order on December 8, 2004, finding that reasonable efforts were made to prevent A.J.M.'s removal from the home and that it was in her best interest for the court to take custody of her. The family court then committed A.J.M. to the Cabinet, ordered T.G. to cooperate with the Cabinet and participate in any treatment or social services program, and ordered her to pay $70 per month in child support. While the initial goal was to return A.J.M. to her mother, the Cabinet moved to change the permanency goal to adoption. To that end, the Cabinet filed a Petition for Involuntary Termination of Parental Rights on April 8, 2005, naming both T.G. and Andrew M., A.J.M.'s putative father, as respondents. The family court appointed a *guardian ad litem* to represent A.J.M.'s interests. A bench trial was held on November 1, 2005.

During the trial, the Cabinet introduced the live testimony of four witnesses. Deposition testimony from two more witnesses was filed subsequent to the trial. Dr. Sally Brenzel, a licensed

clinical psychologist who was qualified as an expert witness, performed a psychological evaluation on T.G. in 2005. As a result of her evaluation, Dr. Brenzel diagnosed T.G. with Generalized Anxiety Disorder and Borderline Personality Disorder with obsessive compulsive traits. She testified that these diseases and the symptoms associated with them are treatable, but dramatically affect T.G.'s ability to parent A.J.M. Her ability to parent was affected in that she was unable to exercise good judgment and follow through with A.J.M's basic needs or to navigate various relationships, both personal and professional. In Dr. Brenzel's opinion, improvement would be possible if T.G. could form and maintain baseline communication with the critical people in her life. Dr. Brenzel admitted on cross-examination that there had not been any report of injury to A.J.M.

Dr. Peggy Kinnetz, a mental health counselor who worked with T.G. in a parenting group, testified that T.G. completed her classes. Dr. Kinnetz observed T.G. with A.J.M. and was initially concerned about a lack of bonding, although this improved. She was noted problems with T.G.'s ability to set boundaries and to put A.J.M.'s needs above her own. Other areas of concern included T.G.'s refusal to take responsibility for previous neglect or abuse and her mistrustful and suspicious nature. Regarding her anxiety diagnosis, Dr. Kinnetz stated that the disorder would affect her ability to make good decisions and to relate to others.

T.G.'s stepmother, Nancy G., testified about the problems she encountered when she and her husband (T.G.'s father and A.J.M.'s grandfather) supervised T.G's visitation with A.J.M. for approximately two months in early 2005. While the first few visits were very good, later ones were not.

Nancy G. testified that T.G. excessively changed A.J.M.'s diapers, rearranged A.J.M.'s clothing, fed her inappropriate good, engaged in arguments in A.J.M.'s presence, kept A.J.M. up too late and left her on the floor during a shower.

Social worker Sky Tanghe was the last witness who testified for the Cabinet live at trial. She testified that she had been working with the family since 1996, when the first abuse allegation arose. Her first contact with A.J.M. was right after her birth, when the ECO was filed. Tanghe reopened the case on July 30, 2004, when she received a report of neglect. The report was that T.G. left A.J.M. on the concrete ground while she engaged in batting practice. An assessment team went to T.G.'s home and found the residence to be in deplorable condition. An ECO was entered and A.J.M. was removed. The record of the dependency action was admitted without objection. Tanghe also testified about the services the Cabinet provided to T.G., including putting a HELP team in place, providing parenting classes, scheduling evaluations, and providing therapy. She noted that while T.G. had attended her appointments, she had not completed all of the services recommended for her. Tanghe could not identify any improvement related to T.G.'s mental health issues, as she could not establish a relationship with a therapist. While Tanghe stated that T.G.'s support payments were not consistent, she would bring food, toys, and clothes during visitations. A.J.M.'s physical health was good at the time of the removal. At the time of trial, A.J.M. was medically in great shape and was above average in intelligence and development. Tanghe indicated that her foster home wanted to adopt A.J.M., and that her foster mother has a strong relationship with A.J.M.'s

maternal grandparents, so that contact would be kept up with the family after the adoption. Finally, Tanghe testified that there was nothing more the Cabinet could do to address T.G.'s mental health or to effect a successful reunification because T.G. would not take advantage of the services offered to her or stick with anything.

The Cabinet also relied upon the deposition testimony of clinical psychologist Dr. Patricia Aulbach and mental health counselor Dr. Daya Singh Sandhu. Dr. Aulbach started a therapeutic relationship with T.G. in mid-2005 regarding her mental issues on the recommendation of Dr. Kinnetz. T.G.s' initial diagnosis was Generalized Anxiety Disorder and Paranoid Personality Disorder. Dr. Aulbach noted that T.G. was very anxious during the sessions, due to her concerns about the Cabinet, and they were unable to develop a therapeutic relationship. At the end of their relationship, Dr. Aulbach gave T.G. a poor prognosis, unless she was willing to develop a relationship with a therapist and work on her issues. Dr. Singh met with T.G. three or four times. He was unable to formulate an opinion regarding T.G.'s ability to parent as he did not have enough contact with her. Dr. Singh did testify that T.G. worried that is she received psychiatric treatment, it would negatively affect her case.

T.G. relied upon the testimony of licensed certified social worker and marriage counselor Alison Johnson. She and T.G. first met in late 2004, and resumed their sessions in late 2005. In these sessions, they addressed T.G.'s anxiety over her children. During the later visits, Johnson noted that T.G. was more balanced emotionally and was learning to be a better parent with a greater willingness to listen. She testified that a long-term

therapeutic relationship depended on T.G., and that she felt connected so far. Johnson also stated that other groups, both in and out of the home, would be beneficial to T.G. She admitted on cross-examination that she had not reviewed other records, but was aware of T.G.'s diagnosis and that she was taking an antianxiety medication. Although she could not recommend that A.J.M. be returned home at that time, Johnson recommended a structured transition.

T.G. also relied upon the testimony of Betty Scharfenberger, who participated in group therapy sessions with her at Recovery, Inc. Betty testified that T.G. got better and calmer over time and had improved due to the program.

Finally, T.G. testified as to the issues raised in the proceeding. She testified that she has a degree in advertising and marketing, and currently rents properties. Regarding the state of her residence when A.J.M. was removed, T.G. explained that she was remodeling the unit, and that any problems were either accidental or unavoidable (i.e., the clogged sink). At the time of the trial, the unit was clean. Regarding the batting cage incident, T.G. testified that she did not intend to be neglectful, as she had placed A.J.M. on a blanket and kept her eye on her. She testified that she was under considerable pressure from the Cabinet to be perfect. She also was able to dispute or explain Nancy G.'s testimony regarding the incidents from their visitations. T.G. indicated that she wished to continue her sessions with Alison Johnson, as they had a good therapeutic relationship. She also pointed out that she engaged in regular visitation with A.J.M., had been paying child support, and had completed her parenting classes. She believed that she could care for A.J.M. and that she should be returned to her.

On March 16, 2006, the family court entered its Findings of Fact, Conclusions of Law as well as the Order Terminating Parental Rights and Order of Judgment. In the order, the family court made the following findings:

1. The child, [A.J.M.], is an abused and neglected child as defined in KRS 600.020.

2. The Respondent mother, for a period of not less than six (6) moths, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and there is no reasonable expectation of improvement in the parental care and protection, considering the age of the child.

3. The Respondent mother, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care or education reasonably necessary and available for the child's well being and there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child.

4. Termination of parental rights is in the best interest of the child.

5. The Cabinet of Health and Family Services is best qualified to receive custody of the child.

The family court went on to vest the Cabinet with A.J.M.'s custody, along with the authority to place her for adoption, and made her a ward of the State. The family court later denied T.G.'s CR motion to alter, amend or vacate, or for a new trial. This appeal followed.

REASONS FOR GRANTING THE WRIT

1.KRS 625.090(1)(a)(1) is unconstitutional.

Respectfully, Petitioner insists that KRS 625.090(1)(a)(1) is unconstitutional both on its face and as applied by the trial court, because it circumvents the requirement that all facts must be found by "clear and convincing evidence," and allows the trial court to adopt findings from the dependency adjudication of "abuse and neglect", the "threshold" issue, which only requires proof under the lower "preponderance of the evidence" standard.

KRS 625.090 authorizes the termination of parental rights only after a "threshold" finding that the child is abused or neglected per KRS 625.090(1)(a)(1) and/or KRS 625.090(1)(a)(2). In a termination proceeding a trial court can find the "threshold" issues either or both by finding (1) that a previous dependency adjudication of neglect or abuse occurred, or (2) the trial court can independently make a finding of neglect or abuse in the termination trial itself

The first of these two procedures, which is expressly authorized by t6he statute, is violative of due process and of the rules of evidence, since it allows the "threshold" finding to be made satisfied merely by the submission of a certified copy of the underlying dependency adjudication, alone, without any further substantial evidence at the termination trial itself.

It is manifest that dependency adjudication findings are adduced at the lower "preponderance of evidence" standard, and that such findings, without

more, cannot provide the requisite factual support in a termination trial, where the standard is the higher "clear and convincing" standard.

As the Court will note, the trial court found both that a prior adjudication of abuse or neglect had occurred, and also that such was additionally, independently, proven in the termination trial itself.

As shown below, Petitioner contends that "abuse or neglect" was not proven in the termination trial, *i.e.,* there was no "substantial evidence" before the court in that proceeding to determine from that proceeding "abuse or neglect" or Amanda had occurred.

Assuming, *arguendo,* that "abuse and neglect" as defined in KRS 600.020(1) was *not* proven in the termination case, the issue is whether a prior adjudication of abuse or neglect, entered by certified copy of same at the termination trial, can *alone* be the evidence of the "threshold" finding prior to addressing the ten factors set forth in KRS 625.090(2).

Petitioner contends that the mere entry as an exhibit of the "certified copy of the dependency record" does not by such mechanism alone create proof by "clear and convincing evidence" of any information, findings, or facts for purposes of terminating a parent's rights. Therefore, to the extent the trial court used the certified copy of the dependency record, and the adjudication therein, to satisfy the required "threshold" finding - or other facts for which no evidence was introduced in the termination trial - Petitioner contends that the trial court violated her due process rights.

Petitioner also contends that, to the extent the statute purports to allow the "threshold" finding of abuse and neglect to be e stablished in a termination

trial by entry of a certified copy of a dependency adjudication, the statute violates the constitution and federal case law interpreting it as it allows findings made under the lower "preponderance of evidence" standard, in lieu of the required "clear and convincing evidence" standard.

Petitioner also contends that, to the extent KRS 625.090(1) allows the threshold finding of abuse and neglect to be established "from the pleadings," such is also unconstitutional as the pleadings are not evidence, and cannot be considered as such.

In a dependency adjudication under KRS 620, the burden of proof is "preponderance of evidence." K620.100(3). However, in a termination trial the burden of proof is "clear and convincing evidence"; *see,* KRS 625.090(1); *Santosky v. Kramer,* 455 U.S. 745, 769-60 (1982); *.S. v. C & M.S.*, 642 S.W.2d 589, 591 (Ky. 1982).

It is axiomatic that if "abuse and neglect" as defined by KRS 600.020(1) must be found by "clear and convincing" evidence in a termination trial, then mere entry of certified findings from a previous dependency adjudication in another case as an exhibit in the termination trial cannot *alone* meet the standard.

The trial court was simply not authorized to *adopt* information in the dependency record by virtue of the fact that such was introduced as an exhibit for purposes of satisfying KRS 625.090(1)(a)(1). Tendering a certified copy of the dependency docket as proof of a prior adjudication of abuse is one means of establishing the "threshold" burden under the statute.

But accepting the information in that document as proven by "clear and convincing evidence" *without independent proof in the termination*

trial itself, is clear error. Petitioner contends that since "abuse and neglect" was *not proven in the termination trial itself,* the only evidence from which the required "threshold" finding could have been found, is the certified copy of the dependency adjudication introduced as an exhibit in the termination trial.

Such practice constitutes a violation of due process as those findings were made under the lower standard. Moreover, to the extent the statute authorizes such use, the statute violates due process, in that it allows a court to adopt findings or information from the dependency case, which information is proven only by a preponderance of evidence, in lieu of considering evidence and making findings under the required "clear and convincing" standard.

2. There was no substantial evidence of "abuse or neglect."

In addition to finding that a child has been adjudged to be abused or neglected, a circuit court may determine, based upon clear and convincing evidence, that "the child is found to be an abused or neglected child, as defined in KRS 625.090(1)(a)2.

In the present case, the family court's finding that A.J.M. is at risk to be abused or neglected appears to be based on T.G.'s mental health problems and her history of resultant neglect or abuse or her two older children. We note that there is only cursory unsupported information in the record detailing the reason T.G.'s two older children were removed from her custody. The family court devoted a

considerable portion of its findings of fact to T.G.'s mental health diagnoses as well as her treatment and therapy, ultimately concluding that her treatment had not remedied her symptoms or improved her condition to the extent that she could safely care for A.J.M. A theme running through the reports and testimony of her treatment providers is T.G.'s inability to engage in relationships, therapeutic or otherwise. Another theme is T.G.'s inability to exercise good judgment in relation to parenting A.J.M. All providers testified that T.G.'s diagnoses and symptoms were treatable.

At the time of the hearing, T.G. had returned to a previous counselor, Alison Johnson, whom she described as "enlightening." When T.G. resumed therapy in November 2005, Johnson indicated that her emotions were more balanced, that she was handling her diagnoses much better, and that she was learning to be a better parent. Johnson also testified that although she could not recommend a return of A.J.M. to T.G. at that time, an eventual, supervised return should take place. To T.G.'s credit, there is no evidence that A.J.M. had ever been injured, either physically or emotionally, while in her care, and she was in fact in good health at the time of her removal. Based upon this evidence of record, we must conclude that there is no substantial evidence to support the family court's finding of abuse or neglect under KRS 625.090(1)(a)2.

Because there is no substantial evidence to support a finding under either subsection 1. or 2. or KRS 625.090(1)(a), and there is no allegation of criminal charges under subsection 3., the family court erred in finding that A.J.M. was abused or neglected. Thus, the first prong of the three-part test has not been met.

3. The trial court lacked "clear and convincing evidence."

The holding of the trial court is also erroneous because it was not based upon "clear and convincing evidence." The grounds upon which a finding of "abuse or neglect" may be based are set out in KRS 625.090(2). In determining whether one or more of the grounds exist, a trial court is required to consider six factors, which are set out in KRS 625.090(3).

In the present case, the family court determined that grounds existed under KRS 625.090(2)(e) and (g). In its review of the six factors, the family court found that the Cabinet rendered reasonable efforts to reunify the family. KRS 625.090(3)(c). Furthermore, the family court found that the Cabinet had met A.J.M.'s needs since removal from T.G.'s custody and the prospects for improvement of A.J.M.'s welfare was greater is parental rights were terminated as her foster family wanted to adopt her. KRS 625.090(3)(e). Finally, the family court found that the Cabinet examined T.G.'s mental health. KRS 625.090(3)(a).

While there was testimony concerning T.G.'s mental illness, the statute provides that such mental illness must "render the parent consistently unable to care for the immediate and ongoing physical or psychological needs of the child for extended periods of time[.]" KRS 625.090(3)(a). However, the family court did not conclude or find that T.G.'s mental illness rendered her unable to consistently care for A.J.M.

In addition, psychologist Dr. Brenzel testified that T.G.'s diagnoses dramatically affect her ability to parent, but are manageable, and improvement is

possible if she can form and maintain baseline relationships with the critical people in her life.

Mental health counselor Dr. Kinnetz noted the progress T.G. made during their 2004 sessions, but her mistrust and suspicions would not allow A.J.M. to be returned to her at that time. Neither of these witnesses testified that T.G.'s mental illness brought her within the scope of the statute.

As to reunification, the Cabinet did make efforts by providing parenting classes and therapy for T.G. However, T.G. completed what the Cabinet recommended, and much of what the Cabinet social worker Tanghe testified to took place prior to A.J.M.'s birth. Furthermore, the Cabinet did not offer in-home services to T.G. when social worker and counselor Alison Johnson recommended these services for a successful reunification.

In sum, there was no substantial evidence that T.G. failed or was incapable of providing essential food, clothing, shelter or medical care. This was evident through the results of A.J.M.'s medical examination and testimony that she is above-average in both her intelligence and developmental levels. For this reason, the family court erred in finding otherwise.

Since there was no substantial evidence to support the family court's finding that A.J.M. was abused or neglected, or that a ground supporting termination exists, Petitioner submits that the family court clearly abused its discretion in terminating T.G.'s parental rights to A.J.M.

CONCLUSION

As shown above, the judgment of the court below was clearly erroneous and must be reversed. This Court, therefore, should grant certiorari to the Kentucky Supreme Court and, upon hearing, remand the action to the trial court with directions that the action be reinstated on the court's docket and that the Petitioner be granted a new trial. Petitioner prays for an Order of the Court so holding.

Respectfully submitted,

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